

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

MARVIN RODRIGUEZ,  
*APPELLANT*

V.

THE STATE OF TEXAS,  
*APPELLEE*

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NO. PD-1130-19

FILED  
COURT OF CRIMINAL APPEALS  
1/27/2021  
DEANA WILLIAMSON, CLERK

*ON DISCRETIONARY REVIEW OF CAUSE NUMBER 02-17-00371-CR,  
AFFIRMING CAUSE NUMBER 1432306D IN THE 396<sup>th</sup> DISTRICT COURT OF  
TARRANT COUNTY, TEXAS; THE HONORABLE GEORGE GALLAGHER,  
PRESIDING.*

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**STATE'S BRIEF ON THE MERITS**  
§ § §

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## **IDENTITY OF THE PARTIES AND COUNSEL**

Pursuant to TEX. R. APP. P. 38.1(a), the following is a complete list of all parties to the trial court's judgment or order appealed from, and the names and addresses of all trial and appellate counsel:

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**NO. PD-1130-19**

*ON DISCRETIONARY REVIEW OF CAUSE NUMBER 02-17-00371-CR, AFFIRMING CAUSE NUMBER 1432306D IN THE 396<sup>th</sup> DISTRICT COURT OF TARRANT COUNTY, TEXAS; THE HONORABLE GEORGE GALLAGHER, PRESIDING.*

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

**STATEMENT OF THE CASE**

Marvin Rodriguez (“Appellant”) was charged with murder. CR 1:7. A jury found him guilty. CR 1:133. The jury assessed Appellant’s punishment at twenty years’ confinement, and the trial court sentenced him accordingly. CR 1:143, 146. Appellant filed notice of appeal on November 2, 2017. CR 162.

A panel of the Second Court of Appeals in Fort Worth, Texas, affirmed the judgment and sentence in Appellant’s case on August 19, 2019. *See Rodriguez v. State*, No. 02-17-00371-CR, 2019 WL 3491647 (Tex. App.—Fort Worth Aug. 19, 2019) (mem. op., not designated for publication). Appellant’s motion for rehearing was overruled by the Second Court on September 26, 2019. Appellant filed a petition for review in this Court, which was granted on November 4, 2020.

### **ISSUES PRESENTED FOR REVIEW**

1. Whether the Second Court erred by holding that Appellant did not raise a justification defense.
2. Whether the Second Court erred by failing to examining the facts in the context of entire episode when deciding if Appellant raised a justification defense.
3. Whether retention of the confession-and-avoidance doctrine is unnecessary.

## **STATEMENT OF FACTS**

### **The Tailgate**

The Dallas Cowboys' played the New England Patriots in Arlington on the October 11, 2015. RR 5:41-42. Eager fans arrived hours before kickoff, hoping to secure a good spot to tailgate outside the stadium. RR 5:139. Some fans, like Mariela Coronado, arrived as early as 7:00 a.m. to set up. RR 5:138-139. Coronado, along with her husband, children, and friends, settled on an area in Lot 10 of AT&T Stadium to tailgate. RR 5:139-140. Once there, they set up their tents, TVs, table, grill, food, and coolers. RR 5:140. Coronado and her party were one among many different tailgate parties in Lot 10. RR 5:91.

Richard Sells – the victim in this case – went to a tailgate party in Lot 10 with his fiancée, Angelica Secundino. RR 5:89. Sells and Secundino had been invited to the tailgate by Francisco Leal and his wife, Gabriela. RR 5:90. Also at the tailgate was Sells' friend, Candido Rodriguez, and Candido's brothers: Javier Rodriguez and Appellant. RR 5:93.

Everyone at the tailgate was getting along and enjoying themselves as they ate, drank, and watched the game on their TVs. RR 5:95-96. With few exceptions, the tailgaters were consuming alcohol in abundance throughout the day. RR 5:96-97, 134. Some members of the party took shots of liquor while others played drinking games. RR 5:135; RR 8:81. After the football game ended, and the game's

attendees spilled out of the stadium, the tailgater's continued their party. RR 5:97. Eventually, however, members of the party were prompted by security officers to pick up their trash, pack up, and vacate the parking lot. RR 5:98.

### *The Fight Breaks Out*

As the tailgaters were picking up trash, an argument broke out between Candido, Miguel, and Francisco. RR 5: 88-89; RR 8:52-55. According to Candido, the argument began after he tossed a beer can and caused its contents to splash onto Miguel. RR 5:53. Words were exchanged, and then the altercation turned physical as Candido and Francisco engaged in a fistfight. RR 5:100. Others at the scene tried unsuccessfully to separate the two. RR 5:100. When the fight broke out, Sells and Secundino were standing at a nearby table. RR 5:101.

The Candido/Francisco fight ignited a series of fistfights between other members of the tailgate party. RR 5:102. Lester Peters came over to the scene of the fights after seeing a woman trapped under a pile of fighting men. RR 5:171. Realizing that the woman was in distress, Peters asked one of the men near the pile if he could get his friends to extract her. RR 5: 172.

### *Appellant Retrieves His Gun*

Before Peters (a non-combatant) could even turn around, however, Appellant had a gun pointed to the back of his head. RR 5:173. Appellant had retrieved the gun from his car after the fighting broke out, and he brought it back to the area of

the fight. RR 5:205. Peters' friend, Jarel Westbrook, testified that Appellant held the gun to Peters' head for thirty seconds to one minute. RR 5:208. Meanwhile, Appellant kept repeating to Peters, "Do you think I'll do it? Do you think I'll pull the fucking trigger?" RR 5:176. Westbrook heard Appellant tell Peters, "I will fucking kill you." RR 5:209. Eventually, Appellant let Peters go after turning him around in circles and ripping his shirt. RR 5:176-177. Peters and Westbrook then quickly exited the scene and headed toward Peters' truck. RR 5:209. Ten to fifteen seconds after Peters and Westbrook left the scene of the fight, they heard a gunshot. RR 5:179.

#### *Differing Accounts*

The circumstances surrounding the gunshot and what led to it were a point of contention at trial. Appellant and Candido told one story, whereas the other witnesses told a different story. RR 5-8: *passim*.

#### *Candido's Story*

Candido testified that, after he exchanged words with Miguel regarding the spilled beer, he was punched on the side of his face. RR 8:55-56. He blacked out, but when he regained consciousness, he was on the ground with someone choking him and hitting his face. RR 8:56. He was being repeatedly kicked and hit, and he was yelling for his brother Javier to help him. RR 8:56-57.

Candido testified that he could not breathe and he felt he was losing consciousness. RR 8:57. Meanwhile, according to Candido, Francisco put him in a headlock, threw him to the ground, and landed on top of him. RR 8:59-61. Candido felt someone punching him, and he felt something heavy on top of him. RR 8:62-63. As he began to lose consciousness again, Candido heard a gunshot. RR 8:63. The heavy weight that was on him lifted, and he felt like he could breathe again. *Id.* Candido was not able to determine who was on top of him before the gunshot. RR 8:64.

#### *Appellant's Story*

Appellant testified that he saw Candido on the ground, surrounded by multiple men who were kicking him. RR 9:27. Of the participants in the fight, Appellant only recognized Candido and Miguel. RR 9:27-28. Unable to stop the fight with just his fists – and having been punched and knocked down twice himself – Appellant decided to get his gun. RR 9:31. The gun was in the vehicle that Appellant had arrived in earlier that day. RR 9:32. After retrieving his gun, Appellant ran back to the fight. RR 9:32. He acknowledged putting his gun up to Peters' neck and telling him to “get the fuck out of there.” RR 9:33. Appellant claimed he thought Peters was “joining in jumping [his] brothers.” RR 9:34. After he let Peters go, Appellant ran to his brother, Javier, who had “a bunch of guys on

him.” RR 9:37. He started moving guys to the side, trying to get them off Javier. RR 9:37-38.

Then, according to Appellant, about five people chased Candido, surrounded him, and started beating him. RR 9:44. Appellant pulled his gun from his waistband, thinking that the men were going to injure Candido. RR 9:44-45. He saw one man, Sells, kneeling on Candido and punching him. RR 9:45. Appellant grabbed Sells, put him in a headlock, and put his gun to Sells’ neck. RR 9:45. Appellant testified that Sells jerked back as someone else behind Appellant tried to grab the gun. RR 9:45-47. The gun “went off,” resulting in Sells’ death. RR 9:47.

Appellant testified that he did not intend to kill Sells or to even fire the gun at all. RR 9:8, 47. He claimed that he pointed the gun at Sells’ neck because he was afraid that the group leading the attack on Candido was going to kill him and then kill Appellant too. RR 9:48-49. Appellant consistently maintained that he did not voluntarily shoot the gun. RR 9:8, 47, 70.

### *Others Tell a Different Story*

Secundino testified that Sells was not involved at all in the fighting; rather, he was trying to break it up. RR 5:102. When Sells tried to pull Candido away from the fight, Appellant pushed Sells back. RR 5:106. When, Sells again tried to pull Candido away from the pile, Appellant came up from behind Sells and shot him. RR 5:107.

Rodney Webb, who was a part of another nearby tailgate, observed the shooting and the events leading to it. RR 5:241. He first saw a fight where three or four guys were fighting one guy. RR 5:246-47. Sells was not involved in this particular fight. RR 5:47. Webb saw a woman try to break up the fight, and he also saw someone in a blue Rangers shirt – Appellant – take a swing at the woman and then run into some nearby bushes. RR 5:248-49. When Appellant emerged back from the bushes, he had a gun in his hand. RR 5:51.

By the time Appellant returned with his gun, the fight was dying down; there were only two men still wrestling on the ground. RR 5:250. One of the men was Sells. RR 5:250. Webb did not see Sells throw any punches. RR 5:250. Appellant walked over to the two men as they were getting up. RR 5:255. Appellant told the other man to move, and then he pointed his gun to Sells' head and shot him. RR 5:254-55. After Appellant shot Sells, he and the other man involved in the wrestling both took off through the bushes. RR 5:256.

From what Webb saw, he did not believe Sells did anything to warrant being shot. RR 5:256. To Webb, it appeared that Sells was just trying to break up the fight. RR 5:257. Contrary to Appellant's testimony, Webb testified that he did not see Appellant get knocked down, and he did not see any injuries inflicted on Appellant. RR 5:273-74.



Anthony Aguirre, a bystander from another neighboring tailgate, made similar observations. RR 5:298. He testified that Sells was just trying to get up from the ground when Appellant shot him. RR 5:298. Aguirre saw Appellant “pistol-whip” someone else before shooting Sells. RR 5:302. Aguirre did not see Sells strike anyone and he did not see that Sells had a weapon. RR 5:298. In fact, the only weapon at the scene – according to every witness that testified about the presence of weapons – was Appellant’s gun. RR 5:181, 211, 298.

*Appellant’s Botched Flight from the Scene*

After Appellant shot Sells, he and Javier Rodriguez ran through the bushes and got into Javier’s Hummer. RR 5:59, 305. Before they could leave the scene, however, Lieutenant Carol Riddle of the Arlington Police Department arrived. RR 6:24. As the Hummer was moving forward slightly, she yelled at the driver of the vehicle – Javier – to stop the vehicle. RR 6:24-25. Javier complied. RR 6:26. After multiple people identified the passenger, Appellant, as the shooter, Riddle ordered Appellant out of the car and to the ground. RR 6:26-27. Appellant, however, was slow to get out of the car and would not get on the ground, so Riddle had to take him to the ground and put him in handcuffs. RR 6:27. Appellant was then arrested. RR 6:32-33. The weapon, a Glock .357 loaded with ten live rounds, was recovered at the scene. RR 6: 86.

*Sells' Death*

Sells was rushed to the hospital and was placed on life support. RR 5:108-09. The gunshot wound had severed his spinal cord and caused his brain activity to cease. RR 5:109, 146-47. Richard Sells died two days after Appellant shot him. RR 5:109.

## **SUMMARY OF THE ARGUMENT**

### **Response to Appellant's First Issue**

This Court should not address this unpreserved complaint. Regardless, the Second Court did not err because Appellant, as the only party armed and the only party to use deadly force, was not entitled to a justification instruction. Further, Appellant did not sufficiently admit the conduct to require a justification instruction.

### **Response to Appellant's Second Issue**

Appellant has not adequately briefed this issue.

### **Response to Appellant's Third Issue**

Appellant provides no compelling reason to do away with confession-and-avoidance.

## **STATE'S RESPONSE TO APPELLANT'S FIRST ISSUE**

### **Appellant's Contention**

The Appellate court erred in determining that Appellant did not sufficiently raise a justification defense.

### **State's Response**

This Court should not address this unpreserved complaint. Regardless, the Second Court did not err because Appellant, as the only party armed and the only party to use deadly force, was not entitled to a justification instruction. Further, Appellant did not sufficiently admit the conduct to require a justification instruction.

### **Argument**

#### **I. Standard of review**

Appellant complains that the Second Court erred by holding that the trial court correctly denied Appellant's requested justification instructions. *Appellants Brief* at 10. The trial court's decision not to include a defensive issue in the jury charge is examined for an abuse of discretion. *See Love v. State*, 199 S.W.3d 447, 455 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (citing *Wesbrook v. State*, 29 S.W.3d 103,122 (Tex. Crim. App. 2000)). When reviewing a trial court's denial of a requested defensive instruction, the reviewing court reviews the evidence in the light most favorable to the defendant's requested instruction. *Bufkin v. State*, 207 S.W.3d

779, 782 (Tex. Crim. App. 2006); *Ferrel v. State*, 55 S.W.3d 586, 591 (Tex. Crim. App. 2001).

## **II. Appellant did not preserve this complaint for appellate review.**

An objection must inform the trial judge of the basis of the objection and afford the judge an opportunity to rule. *Aragon v. State*, 229 S.W.3d 716, 720 (Tex. App.—San Antonio 2007, no pet.). If an appellant’s argument on appeal regarding a defensive issue or lesser-included instruction relies on a different ground than that argued at trial, the reviewing court should not address the complaint. *See Penry v. State*, 903 S.W.2d 715, 753 (Tex. Crim. App. 1995); *Alcoser v. State*, 256 S.W.3d 398, 400 (Tex. App.—San Antonio 2008, no pet.) (refusing to address jury charge complaint: “[T]he factual dispute that defense counsel argued as support for the instruction at trial is far different than the factual dispute asserted in the appellant’s brief.”)<sup>1</sup>

When requesting justification instructions (self-defense, defense of third person, necessity), Appellant argued the following theory to the trial court:

[Appellant] testified he did not intend to cause Mr. Sells’ death and that he did not intend to cause him serious bodily injury and do an act clearly dangerous to human life; in

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<sup>1</sup>*See, e.g., Settles v. State*, No. 05-14-00382-CR, 2015 WL 3522838, at \*5 (Tex. App.—Dallas June 3, 2015, pet. ref’d) (mem. op., not designated for publication) (complaint on appeal regarding different lesser-included instruction than that requested at trial preserves nothing for review); *Walker v. State*, No. 04-13-00837-CR, 2014 WL 5463948, at \*4 (Tex. App.—San Antonio Oct. 29, 2014, no pet.) (mem. op, not designated for publication) (refusing to address defensive issue complaint as unpreserved: “In the instant case, defense counsel argued for a necessity defense with regard to [] carrying the handgun, not necessity with regard to [] shooting [the victim].”)

other words, that he was not guilty of murder. And under the confession and avoidance doctrine, unless there was evidence from someplace else that the defendant did intentionally cause the death, that would mean he's not entitled to self-defense on that offense.

Our position is that the testimony from the other witnesses essentially that the defendant clearly did an intentional act, namely putting the gun up to the guy's head and pulling the trigger without any intervention, raises the issue of whether he did an intentional act.

RR 10:105-06.

According to Appellant's argument at trial, *his testimony did not raise a justification defense because he denied the charged conduct*; however, evidence other than his testimony raised the defense. On the other hand, Appellant argues on appeal that *his* testimony was sufficient to raise the defense because he "did substantially admit to the charged act." *See Appellant's Brief at 4; Appellant's Brief on direct appeal*, No. 02-17-00371-CR, at 16. (original emphasis)

Because Appellant gave the trial court a different ground for inclusion of justification instructions than he raises on appeal, he did not preserve his complaint for review by the Second Court or by this Court. As such, this Court should not address this complaint.

### **III. Appellant was not entitled to an instruction on justified deadly force.**

Appellant was not entitled to an instruction on justified deadly force for two reasons: (1) there is no evidence that would support a reasonable belief that Sells

used or attempted to use deadly force against anybody; and (2) Appellant did not sufficiently admit to the charged conduct.

**IV. There is no evidence that Sells used or attempted to use deadly force.**

The use of deadly force in defense of oneself or a third party requires a showing of a reasonable belief that the use of deadly force is immediately necessary to counter the other persons use or attempted use of deadly force. TEX. PENAL CODE ANN. §§ 9.32, 9.33 (West 2015). In the absence of the use or attempted use of deadly force by the victim, a justified deadly force instruction is not available to the defendant. *See Werner v. State*, 711 S.W.2d 639, 644 (Tex. Crim. App. 1986). The Penal Code defines “deadly force” as “force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury.” TEX. PENAL CODE ANN. § 9.01(3) (West 2015). Punching someone with a fist does not constitute an attempt to use deadly force. *See Schiffert v. State*, 257 S.W.3d 6, 14 (Tex. App.—Fort Worth 2008, pet. dism’d).

Appellant was not entitled to an instruction on deadly force – either in self-defense or defense of a third person – because there is no evidence that would support a reasonable belief that Sells used or attempted to use deadly force. Most witnesses testified that Sells was merely trying to break up the fighting. RR 5:105-107, 257. At most, according to one witness, Sells was on the ground wrestling at

one point. RR 5:298. Even in Appellant's version of the facts, Sells' simply had the upper hand in a fist fight. RR 9:45.

Appellant contends he was justified in using deadly force under these circumstances because he testified he feared for his and his brother's lives. *Appellant's Brief* at 6. While Appellant did testify to those facts, he still did not present sufficient evidence to warrant a justification of deadly force instruction because he simply did not show that his use of deadly force was in response to a *reasonable belief* that Sells used or attempted to use deadly force. *See Trammell v. State*, 287 S.W.3d 336, 340 (Tex. App.—Fort Worth 2009, no pet.); *Werner*, 711 S.W.2d at 644.

It is undisputed that Sells was unarmed. *See Dearborn v. State*, 420 S.W.3d 366, 378 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (appellant not entitled to self-defense instruction because “complainant was armed with [nothing] other than his fists, and courts have not treated blows with fists as deadly force.”); *see, e.g., Covarrubias v. State*, 14-99-00459-CR, 2000 WL 1228655, at \*3 (Tex. App.—Houston [14th Dist.] Aug. 31, 2000, pet. ref'd) (mem. op., not designated for publication) (Appellant could not have reasonably believed victim was using or attempting to use deadly force against third party when victim was unarmed when he attacked third party, victim did not use a weapon at any time during the fight, and no weapons were found on or around victims body). There is no evidence in the



record that Sells used deadly force at any time during the fight, nor is there any evidence that would support a reasonable belief that Sells attempted to use deadly force against anyone. *See Schiffert v. State*, 257 S.W.3d 6, 14 (Tex. App.—Fort Worth 2008, pet. ref'd) (holding reasonable jury could not have found actor was justified in using deadly force when other person's only use of force was striking with fist); The evidence simply showed that Sells had the upper hand in a fistfight; however, this does not justify the use of deadly force. *See, e.g., Castilleja v. State*, 07-06-0062-CR, 2007 WL 2163111, at \*4 (Tex. App.—Amarillo July 24, 2007, pet. stricken) (mem. op., not designated for publication) (jury did not act irrationally in impliedly finding that defendant was not justified in his use of deadly force in response to fistfight even though evidence showed that victim got the better of defendant in the fight).

Because the evidence did not show that Appellant's use of deadly force was in response to a reasonable belief that Sells was using or attempting to use deadly force, Appellant was not entitled to an instruction justifying a use of deadly force — whether in self-defense or in defense of Candido. *See Werner*, 711 S.W.2d at 644. The Second Court, therefore, did not err by affirming the trial court's judgment.

**V. Appellant did not sufficiently admit to the charged conduct.**

Appellant complains that the Second Court erred in upholding the trial court's denial of his requested justification defenses. A defendant is not entitled to a

justification instruction if, through his own testimony or the testimony of others, he claims that he did not voluntarily perform the action alleged (denying the actus reus), that he did not have a requisite culpable mental state (denying the mens rea), or both. *Ex parte Nailor*, 149 S.W.3d 125, 134 (Tex. Crim. App. 2004); *East v. State*, 76 S.W.3d 736, 738 (Tex. App.—Waco 2002, no pet.); *Wallace v. State*, 75 S.W.3d 576, 587 (Tex. App. — Texarkana 2002); *Gilmore v. State*, 44 S.W.3d 92, 97 (Tex. App.—Beaumont 2001, pet. ref’d).

*To be entitled to a self-defense instruction, the defendant must sufficiently admit to the charged conduct.*

Historically, justification defenses arose only when “the defendant’s defensive evidence essentially admit[ted] to every element of the offense including the culpable mental state, but interpose[d] the justification to excuse the otherwise criminal conduct.” *Shaw v. State*, 243 S.W.3d 647, 659 (Tex. Crim. App. 2007). However, this Court has recently explained that a defendant can raise a justification defense without explicitly admitting to every element of the offense. *Gamino v. State*, 537 S.W.3d 507, 512 (Tex. Crim. App. 2017). Instead, a defendant must sufficiently admit the conduct – the act and the culpable mental state – underlying the alleged offense. *See Juarez v. State*, 308 S.W.3d 398, 399 (Tex. Crim. App. 2010). Appellant was not entitled to a justification instruction because he failed to sufficiently admit to the charged conduct in this case —intentionally or knowingly (and voluntarily) shooting Sells with a firearm.

Offenses have two basic components.

Generally, offenses are comprised of two basic components, the mens rea and the actus reus. *Ramirez-Memije v. State*, 444 S.W.3d 624, 627 (Tex. Crim. App. 2014). The mens rea refers to the mental state required for culpability, in this case intent or knowledge. CR 7; *see Robinson v. State*, 466 S.W.3d 166, 170 (Tex. Crim. App. 2015) (defining mens rea). The actus reus refers to the manner of committing the offense; in this case, voluntarily shooting Sells with a firearm. *See Moulton v. State*, 395 S.W.3d 804, 813 (Tex. Crim. App. 2013) (defining manner and means: “the manner [is] the *actus reus* – shooting, poisoning, hitting, stabbing, strangling [–] of the offense . . .”); *Sanchez v. State*, 376 S.W.3d 767, 773 (Tex. Crim. App. 2012) (“The term “manner and means” refers to the *actus reus* of the crime.”); *Bundy v. State*, 280 S.W.3d 425, 433 (Tex. App.—Fort Worth 2009, pet. ref’d) (actus reus in murder case was “the stabbing”).

Appellant denied the mens rea.

Relevant to the mens rea component of Appellant’s murder conviction, the State was required to prove that Appellant intended to cause Sells serious bodily injury or death when he shot him with a firearm, or that Appellant knew that shooting Sells with a firearm was reasonably certain to cause his death. CR 7; *see* TEX. PENAL CODE ANN. 19.02 (West 2015). However, Appellant repeatedly denied intending to kill or even harm Sells. RR 9:68-71, 89, 101. Further, Appellant never testified

that he voluntarily shot Sells knowing that doing so was reasonably certain to cause Sells death, nor did he imply this. RR 9:8-114.

Because Appellant repeatedly denied having a culpable mental state required to commit murder, and because the evidence did not allow for a reasonable inference that Appellant admitted to having a culpable mental state required to commit murder, Appellant was not entitled to his requested justification instructions. As such, the Second Court did not err by affirming the trial court's judgment.

*Appellant denied the actus reus.*

In Texas, the actus reus component of criminal liability is satisfied *only* if a person voluntarily engages in conduct, including an act, an omission, or possession. *See* TEX. PENAL CODE ANN. § 6.01(a) (West 2015). This means that in order for Appellant to have sufficiently admitted to the charged conduct in this case, he would have needed to sufficiently admit to voluntarily shooting Sells with a firearm. CR 1:7; *See Moulton*, 395 S.W.3d at 813; *Sanchez*, 376 S.W.3d at 773. He did not do so. In fact, Appellant went to great lengths to specifically *deny* voluntarily shooting Sells and causing his death. RR 9:68-70. At most, Appellant admitted to 1) consciously disregarding a substantial and unjustifiable risk by introducing a loaded gun into an alcohol-fueled fight, and 2) grabbing Sells and holding a gun to his neck. RR 9:45-47. In other words, Appellant possibly admitted to manslaughter

and aggravated assault with a deadly weapon. *See* TEX. PENAL CODE Ann. §§ 19.04; 22.01(a)(2), 22.02(a)(2) (West 2015).

The indictment did not allege that Appellant committed manslaughter<sup>2</sup> or aggravated assault with a deadly weapon. CR 1:7. He was charged with murder; specifically, causing the death of Richard Sells by (voluntarily) shooting him with a firearm. *See* CR 1:7. Appellant’s admission to different, uncharged conduct did not entitle him to a self-defense instruction. *See Battles v. State*, No. 14-15-00775-CR, 2017 WL 89401, at \*5 (Tex. App—Houston [14th Dist.] Jan. 10, 2017, pet. ref’d) (not designated for publication) (admission to assaultive conduct different than the assaultive conduct alleged in the indictment “does not constitute a confession to the charged offense” and does not entitle one to a self-defense instruction); *McGarity v. State*, 5 S.W.3d 223, 227 (Tex. App.—San Antonio 1999, no pet.) (defensive issue not raised where the defendant admitted only to throwing the victim on a bed rather than striking her with his hand, as was alleged in the indictment).

Because Appellant did not sufficiently admit to the charged act in this case – (voluntarily) shooting Sells with a firearm – he did not admit to the charged conduct sufficiently enough to raise a justification defense. Moreover, his admission to uncharged conduct did not entitle him to a self-defense instruction. *See Battles*, 2017

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<sup>2</sup>The trial court did include, at Appellant’s request, a lesser-included instruction for manslaughter. CR 128-29.

WL 89401, at \*5; *McGarity*, 5 S.W.3d 223, 227. As such, the Second Court did not err by affirming the trial court's judgment.

**VI. *Ebikam* does not support Appellant's argument.**

Appellant cites *Ebikam*, No. PD-1199-18, WL 3067581 (Tex. Crim. App. 2020), for the prospect that a person does not have to admit to the manner of committing the alleged offense in order to raise a justification defense. *Appellant's Brief* at 11. Therefore, goes the argument, "'confession and avoidance' will no longer be treated like a sacrosanct rule in which a defendant must make a precise confession to a precise criminal allegation . . ." *Appellant's Brief* at 5-6.

While it is true that this Court held in *Ebikam* that a person does not have to admit to the alleged manner of committing the offense in order to raise a justification defense; it also held that "a defensive theory that completely forecloses the commission of the offense itself does not entitle a defendant to a jury instruction on the defensive issue." *Ebikam*, 2020 WL 3067581, at \*4. This means, simply, that a defendant seeking a justification instruction does not have to agree with the State's alleged manner of committing the offense, but he must admit (or at the very least not deny) engaging in conduct for which he could be convicted of the charged offense. *See id.*

Appellant points out his eventual concession to the State's assertion – that the only way the gun could have fired is if Appellant's finger was on the trigger – as

evidence that he confessed to voluntarily causing Sells' death. *Appellant's Brief* at 9-10. However, Appellant's grudging agreement that his finger was on the trigger is a far cry from admitting to voluntarily pulling the trigger and shooting Sells, especially considering that his concession was preceded by a claim that *if* his finger was somehow on the trigger, it was there involuntarily: "I mean, holding [the pistol], [my finger] may have gotten on [the trigger]. I was trying to hold [the gun] tight and [my finger] was being snugged in." RR 9:89. And, Appellant consistently claimed that the fatal trigger pull was the result of a force external to him. He never, not once, admitted to voluntarily pulling the trigger or to voluntarily causing the death of Sells.

Further, the following exchange between Appellant and his expert witness shows that admitting to touching the trigger was not an admission to voluntarily causing Sells' death; rather, it was a piece of evidence intended to establish that he did not voluntarily cause Sells' death:

Q. [I]f I had my finger on this trigger and you're using an external force pulling forward, what's going to happen to this weapon?

A. Well, if you're holding a gun and your finger is in the trigger guard, and I grab the gun and pull it, I'm pulling the trigger against your finger, it's going to fire.

RR 10:68.

Because a person who acts involuntarily commits no offense, Appellant's defensive theory completely foreclosed on his commission of murder, or even manslaughter, for that matter. *See* TEX. PENAL CODE ANN. § 6.01(a) ("a person commits an offense *only* if he voluntarily engages in conduct including an act, omission, or possession."<sup>3</sup> (emphasis added). As such, under *Ebikam*, Appellant's claim of involuntariness barred him from receiving the justification instructions he requested. *See Ebikam*, 2020 WL 3067581, at \*4. Accordingly, the Second Court did not err by affirming the trial court's judgment.

## **VII. This Court has held against Appellant's position.**

Appellant points out authority that supports the idea that a defendant does not have to admit intentionally killing someone (*mens rea*) to raise a justification defense in a murder trial.<sup>4</sup> He also points out authority that a defendant can disagree with the manner (*actus reus*) of committing the offense alleged by the State and still raise a justification defense.<sup>5</sup> However, Appellant points to no authority supporting the idea that, as in the present case, a person can raise a justification defense while denying *both* the *mens rea* and *actus reus* of the charged offense. *See* TEX. R. APP. P. 38.1. The State cannot find any such authority.

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<sup>3</sup>Restated, a person does not commit an offense unless he acts voluntarily.

<sup>4</sup>*Appellant's Brief* at 7-8, relying principally on *Martinez v. State*, 775 S.W.2d 645 (Tex. Crim. App. 1989).

<sup>5</sup>*Appellant's Brief* at 5.



The State, however, was able to find authority in which this Court held against Appellant's position. *See Ex parte Nailor*, 149 S.W.3d 125, 128 (Tex. Crim. App. 2004) (appellant who argued "he did not have the requisite intent and he did not perform the actions the State alleged" not entitled to an instruction on self-defense); *Young v. State*, 991 S.W.2d 835, 838 (Tex. Crim. App. 1999) ("defendant denied committing the acts alleged and denied acting with any intent to cause the victim's death; therefore, his testimony disputed the elements of the State's case; it did not justify those intentional acts with a distinct legal defense[.]").

The Second Court's holding that Appellant did not substantially admit the charged offense because: 1) "[He] did not admit the culpable mental state for murder" and 2) "[He] refused to take ownership of the lethal act," is in accordance with these holdings.<sup>6</sup> *Compare Rodriguez v. State*, 02-17-00371-CR, 2019 WL 3491647, at \*3-4 (Tex. App.—Fort Worth Aug. 1, 2019, pet. granted) *with Nailor*, 149 S.W.3d at 128 and *Young*, 991 S.W.2d at 838. The Second Court cannot be faulted for a holding that is in accordance with precedent established by this Court.<sup>7</sup> *See Adams v. State*, 502 S.W.3d 238, 244 (Tex. App.—Houston [14th Dist.] 2016,

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<sup>6</sup>Also, Appellant's denial of a culpable mental state combined with his claim of involuntariness was, effectively, a "flat denial" of the charged conduct. *See Ebikam*, 2020 WL 3067581, at \*3. ("A flat denial of the conduct in question will foreclose an instruction on a justification defense.") (citing *Nailor*, 149 S.W.3d at 134).

<sup>7</sup>The State is not suggesting that the Second Court decided this case under *Nailor* or *Young*, it did not. The State is merely pointing out that the Second Court's holding is in agreement with those cases.

pet. ref'd) (intermediate courts are bound to follow precedent established by the Court of Criminal Appeals). Accordingly, this Court should affirm the Second Court's opinion.

### **VIII. This case resembles *Ex parte Nailor*.**

In *Ex Parte Nailor*, the victim of an assault told the police that the defendant punched her face and slammed her head into the floor. 149 S.W.3d at 128. She also told her daughter that the defendant hit her head with a porcelain figurine, which was found at the scene, broken and with blood on it. *Id.* The victim did not testify at trial. *Id.*

The defendant testified that the victim accused him of having an affair, and that she raised a brass eagle over her head and threatened to hit him with it. *Id.* In response, he raised his arm to protect himself. *Id.* In doing so, he knocked the brass eagle out of the victim's hands, causing it to fall and strike her face. *Id.*

After being convicted of assault, the defendant filed a writ of habeas corpus alleging, among other things, that his trial counsel was ineffective for not requesting an instruction on self-defense. *Id.* at 128–29. In holding that counsel was not ineffective, this Court explained that Appellant was not entitled to a self-defense instruction:

[Appellant] testified to the lack of a culpable mens rea, and he denied that the act the State alleged as causing her injury—striking [the victim] with his hand—was, in fact, the cause of her injury. Therefore, appellant's defense was more in the nature of a denial of two of the

State's alleged elements, rather than an admission of those elements with a legal justification for them.

*Id.* at 132–33.

Here, like in *Nailor*, Appellant testified to a lack of a culpable mens rea and he denied voluntarily performing the act the State alleged caused Sells' death – shooting Sells with a firearm. RR 9: 68-70. As in *Nailor*, Appellant's testimony was more of a denial of the State's elements than an admission to those elements and a legal justification for them. *Id.* Accordingly, this Court should find that, because Appellant denied both the mens rea and the actus reus, he was not entitled to a justification defense; therefore, the Second Court did not err by affirming the trial court's judgment.

### **STATE'S RESPONSE TO APPELLANT'S SECOND ISSUE**

#### **Appellant's Contention**

The Second Court reversibly erred by not considering the facts within the context of the entire episode when determining whether Appellant raised a justification defense.

#### **State's Response**

Appellant has not adequately briefed this issue. Further, a different approach would have made no difference in this case.

## Argument

### I. Appellant has not adequately briefed this issue.

Appellant argues that whether a defendant raised a justification defense should be determined by examining the facts within the context of the entire episode. *Appellant's Brief* at 10-11. He then accuses the Second Court of formulaically applying a checklist, rather than performing a proper analysis (as defined by Appellant): “For the Fort Worth Court of Appeals, however, confession-and-avoidance became a mere checklist that, in the panel’s view, Appellant failed to complete.”<sup>8</sup> *Appellant's Brief* at 12.

Appellant does not identify with any specificity the alleged error committed by the Second Court. *See* TEX. R. APP. P. 38.1. To be clear, Appellant fails to allege the analytical steps that he believes the Second Court was required to undertake. Consequently, Appellant also fails to allege any required steps that the Second Court failed to perform. And, Appellant fails to identify any part of the Second Court’s opinion that indicates that the Second Court inappropriately examined any facts in isolation. *See* TEX. R. APP. P. 38.1(i) (requiring appropriate citations).

Appellant simply states his preferred method of analysis, then, without citing any example from the Second Court’s opinion, he condemns the Second Court for

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<sup>8</sup>This represents the entirety of Appellant’s identification of the Second Court’s “error” in his second issue.

not following his preferred method of analysis. Appellant's conclusory argument has failed to apply law to fact as the Appellate rules demand. *See, e.g., Rivers v. State*, AP-77,051, 2017 WL 6505792, at \*5 (Tex. Crim. App. Dec. 20, 2017) (citing TEX. R. APP. P. 38.1(i)). Accordingly, this court should overrule Appellant's inadequately briefed second issue.

## **II. An alternate approach would have made no difference in this case.**

While a defendant can receive jury instructions on any defenses raised by the evidence, even if the defenses are inconsistent, a defendant cannot receive a justification instruction when he presents a defense that forecloses on his commission of the charged offense. *See, e.g., Ebikam*, 2020 WL 3067581, at \*4 (defense that forecloses on the commission offense not entitled to justification instruction). As such, Appellant's claim of involuntariness barred him from receiving the justification instruction he requested. *See id*; TEX. PENAL CODE ANN. § 6.01 (a person commits no offense if he acts involuntarily). In other words, Appellant was not entitled to a justification instruction regardless of whether the Second Court failed to consider the facts in the theoretical manner Appellant suggests. Accordingly, the Second Court did not err by affirming the trial court's judgment.

## **STATE’S RESPONSE TO APPELLANT’S THIRD ISSUE**

### **Appellant’s Contention**

This Court should do away with the unnecessary confession-and-avoidance doctrine.

### **State’s Response**

Appellant provides no compelling reason to do away with confession-and-avoidance.

### **Argument**

#### **I. Appellant provides no compelling reason to do away with confession-and-avoidance.**

Self-defense and defense of third person are confession-and-avoidance defenses that justify conduct that would otherwise be unlawful. *Rogers v. State*, 550 S.W.3d 190, 192 (Tex. Crim. App. 2018). A defendant is entitled to a justification instruction only when the defendant's defensive evidence essentially admits to the otherwise criminal conduct, but interposes the justification to excuse it. *Shaw v. State*, 243 S.W.3d 647, 659 (Tex. Crim. App. 2007). The logic behind the admission requirement is sound: an instruction informing the jury that normally illegal conduct was excusable under the law should require the accused to admit to having committed the conduct in the first place; otherwise, there is nothing to justify.

Appellant complains that the confession-and-avoidance doctrine is unnecessary. *Appellant’s Brief* at 13. He argues that confession-and-avoidance is

irrelevant because it was originally a civil pleading rule that was arbitrarily “dragged into the criminal-law-affirmative-defenses arena by *Kimbrow v. State*, 249 S.W.2d 919 (Tex. Crim. App. 1952)”<sup>9</sup>; and he points to cases in two jurisdictions that retain the rule,<sup>9</sup> two jurisdictions that do not,<sup>10</sup> and one case in which he has misconstrued the holding.<sup>11</sup> *Appellant’s Brief* at 13, 16-17.

First, Appellant’s complaint is factually flawed. Texas Courts had been analogizing confession-and-avoidance and affirmative defenses in criminal cases for several decades by the time *Kimbrow* was decided. *See Hollins v. State*, 71 Tex. Crim. 84, 85, 158 S.W. 514 (1913) (unlawful carrying of pistol: appellant’s claim that he carried pistol only for purpose of selling it categorized as “confession and avoidance,” requiring affirmative charge on that theory); *Ake v. State*, 6 Tex. Ct. App. 398, 411 (1879) (defense theory that defendant was too young to face death penalty because he was a minor when he committed crime was “tantamount to a plea

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<sup>9</sup> *Williams v. State*, 588 So.2d 44, 45 (Fla. 1st DCA 1991); *People v. Diaz*, 428 N.E.2d 953 (Ill. App. Ct. 1981)

<sup>10</sup> *State v. Heiskell*, 666 p.2d 207, 212-13 (Kan Ct. App. 1983); *State v. Taylor*, 200 S.E.2d 387, 388 (S.C. 1973)

<sup>11</sup> *State v. Gogolin*, 45 Wash. App. 640, 643-44, 727 P.2d 683 (1986). Appellant claims that the *Gogolin* court “appear[ed] to simply judge [the] defendant’s admissions within the context of all the evidence at trial”; however, the *Gogolin* court specifically held that the evidence in the assault trial did *not* warrant a self-defense instruction because “rather than testifying that he feared for his own safety and that he pushed Nancy down the stairs in self-defense, Robert claimed that she fell accidentally.” *Id.* at 643. In other words, the appellant was not entitled to a self-defense instruction because he did not admit the illegal conduct. If anything, *Gogolin* supports the Second Court’s opinion.

of confession and avoidance.”); *see also Walker v. State*, 42 Tex. 360, 369 (1875) (erroneous language in court’s charge turned alibi, normally a denial of the charges, into a defense in the nature of a plea of confession and avoidance).

Second, Appellant cites to out-of-state jurisdictions without explaining how their jurisprudence is similar to Texas’ or why this Court should consider those decisions persuasive. The existence of different approaches is to be expected in a federalist system, and that fact alone does not provide a compelling reason to do away with a Texas rule that has been in use for more than 100 years.

Finally, this Court very recently stated its unwillingness to do away with confession-and-avoidance because it is so thoroughly enmeshed in Texas criminal jurisprudence:

[O]verruling our confession and avoidance cases would provoke inconsistency and confusion because of the doctrine's extensive influence. For example, it informs our harm analysis when trial courts erroneously refuse to instruct on justification defenses. (citation omitted). It has been applied to a variety of defenses. (citation omitted). And it has been applied repeatedly to self-defense. (citation omitted).

*Ebikam*, 2020 WL 3067581, at \*7.

In short, Appellant provides no compelling reason to overturn a doctrine that has been a part of Texas Criminal jurisprudence for well over 100 years. Accordingly, this Court should retain confession-and-avoidance under the rule articulated in *Ebikam*: A defendant can raise a justification defense without



admitting to all of the State's alleged facts; "But in order for a defendant to be entitled to an instruction on a justification defense, his evidence cannot foreclose commission of the conduct in question." Under this approach, there remains some conduct to "justify." Accordingly, this Court should overrule Appellant's third issue.

### **CONCLUSION AND PRAYER**

Appellant suffered no reversible error. Therefore, the State prays that his Court conviction be affirmed.

Respectfully submitted,

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/s/ John E. Meskunas  
JOHN E. MESKUNAS

### **CERTIFICATE OF SERVICE**

A true copy of the State's brief has been e-served to opposing counsel, Jim Gibson, [jim@jimgibsonlaw.com](mailto:jim@jimgibsonlaw.com), 909 Throckmorton Street, Fort Worth, Texas 76102, on this, the 27<sup>th</sup> day of January, 2021.

/s/ John E. Meskunas  
JOHN E. MESKUNAS

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